Supreme Court, U.S.
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86-2041

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, et al, APPELLANTS

v.

THE FIRESTONE TIRE & RUBBER CO., etc. et al, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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June 19, 1987

THE QUESTION

Did the Court's denial (destruction) of appellant's property rights existing in Appellant's accrued cause of action by retroactively applying to Appellant's action the Pullum decision violate Appellant's federal due process rights under the Fourteenth Amendment of the Constitution of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, et al, APPELLANTS

v.

THE FIRESTONE TIRE & RUBBER CO., etc., et al, APPELLEES*

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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*The complete list of parties below includes Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy, Florida National Bank, as guardian of the property of Kenneth Cassidy, Sharon Cassidy, as wife of Kenneth Cassidy, The Firestone Tire and Rubber Company, a corporation, Ford Motor Company, a corporation and The Budd Company, a corporation.

OPINIONS BELOW

The judgment of the Supreme Court of Florida appears in the Appendix at page 1a. The opinion of the District Court of Appeal, First District of Florida, appears in the Appendix at page 3a. The decision of the Circuit Court of Escambia County, Florida appears in the Appendix at page 7a.

JURISDICTION

Under 28 U.S.C. §1257(2), Appellant Effie Dell Cassidy, as guardian of Kenneth Cassidy, adjudged mentally incompetent, appeals the March 27, 1987, Final Order of the Supreme Court of Florida denying review of Appellant's appeal from the judgment of the District Court of Appeal, First District of Florida. Appellant's appeal from the judgment of the Florida District Court of Appeal addressed the following ground of appeal to Florida Supreme Court:

"Petitioners (accrued) cause of action is a vested property right which cannot be taken away without being violative of the Fifth and Fourteenth Amendments of the U. S. Constitution."

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, Constitution of The United States:

...nor shall any state deprive any person of life, liberty or property without due process of law...

Florida Statutes (1975), Sec. 95.11 (3)(e), the (Statute of Limitation):

--Action other than for recovery of real property shall be commenced as follows:

(3) within four years

(e) an action for injury to a person founded on the design, manufacture, distribution or sale of personal property that permanently incorporated in an improvement of real property including fixtures.

Florida Statutes (1979) Sec. 95.031(2), the (Statute of Repose):

--Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

STATEMENT OF THE CASE

The legislative enactments and court decisions appertaining to the facts of this case and the question involved in this appeal where commenced in 1980 when the Florida Supreme Court in Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) declared Florida Statutes (1979),

Sec. 95.031(2) (the "twelve year" statute of repose) unconstitutional. Thereafter, for five years the law remained unchanged until in 1985 the Florida Supreme Court, in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) overruled its decision in Battilla and declared Sec. 95.031(2) constitutional. The next year, at its first session following the Pullum decision, the Florida State Legislature repealed the "twelve year" statute of repose (Sec. 95.-031(2)).

Examination of the facts of Appellant's case shows first that Appellant's cause of action accrued on February 6, 1982, when Kenneth Cassidy was injured by the explosion of a multi-piece rim wheel manufactured by Appellees, and that his action was instituted on June 2, 1983, in full compliance with Florida Statutes, Sec. 95.11(3)(e), the law prevailing at the time. Thereafter, during the pendency of Appellant's action awaiting trial, The Florida Supreme Court decided in Pullum v. Cincinnati, supra, declaring the "twelve year" statute (Sec.

95.031(2) constitutional. The Pullum decision has been applied retroactively to Appellant's action contra to the premise of Appellant's position that the retroactivity applied violates Appellant's rights protected by provisions of the Constitution of the United States. Therein issues the questions presented to this Supreme Court of the United States by Appellant's appeal, to wit:

QUESTION

Did the Court's denial (destruction) of Appellant's property rights existing in Appellant's accrued cause of action by retroactively applying to Appellant's action the Pullum decision violate Appellant's federal due process rights under the Fourteenth Amendment of the Constitution of the United States:

THE DESTRUCTION OF APPELLANT'S PROPERTY RIGHTS EXISTING IN APPELLANT'S ACCRUED CAUSE OF ACTION BY RETROACTIVELY APPLYING TO APPELLANT'S ACTION THE PULLUM DECISION

VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

It is clear from the cases that this Court leaves it to the State Courts, with few exceptions, to decide whether to make its decisions retroactive or prospective. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). The one most noteable exception to this right held by state courts is where to allow a decision of the court to be applied retroactively the federal due process rights of a party are to be violated. The applicable law and facts of Appellant's case demonstrate that this exception applies to Appellant's appeal to this court. George v. Firestone, a federal case[1], provides a comprehensive treatment of the federal question, same as that involved in Appellant's

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1 Opinion of the United States District Court for the Northern District of Florida (United District Judge Maurice Paul) (Appendix p. 12)

appeal. We cite:

1

"Plaintiff has indeed acquired a property right which would be destroyed by retrospective operation of Pullum. During the dormancy of the statute of repose, between Battilla and Pullum, plaintiff's cause of action accrued. An accrued cause of action must be carefully distinguished from the sort of generalized right to sue possessed by one who has not yet been injured, one merely has a non-vested right to sue which can be legislatively withdrawn." (Emphasis supplied)

2

"An accrued cause of action, on the other hand, is a species of property protected by the due process clause, of which plaintiff may not be deprived by retroactive application of Pullum. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amend-

ment's due process clause."); Coombs v. Getz, 285 U.S. 434, 442 (1932) ("[N]either vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." (Emphasis supplied).

3

Pritchard v. Norton, 106 U.S. 124, 132 (1882) ("Hence it is that a vested right of action is property in the same sense in which tangible things are property and it is equally protected against arbitrary interference.")

4

"This Court concludes that plaintiff's cause of action validly accrued and became vested when Plaintiff was injured. That cause of action is a property right... [R]etroactive application of Pullum to bar plaintiff's previously accrued cause of action would plainly violate plaintiff's federal due process rights."

THE QUESTION IS SUBSTANTIAL

The question presented in this appeal is substantial in that the decision of this Supreme Court will serve to broader reach than the immediate purpose of rectifying the violation of Appellant's due process rights. In the long line of cases from Gelpcke v. City of Dubuque, 1 Wall 175, 17 L.Ed. 520 (1890) to Chevron Oil Company v. Huson, 404 U.S. 97 (1971), this Court has acted to repel different transgressions of rights occasioned by inappropriate instances of retroactivity. The Courts of this nation are served whenever this Court acts to deal with a new or another not well recognized question of retroactivity. Such is Appellant's case here where the decision of this Court will serve to give an answer in form of law and legal guideline whether one's property rights in his accrued cause of action is protected against the retroactive application of an overruling decision which changes the law from what it was when his cause of action accrued and his

property rights therein vested. What the decision of this Supreme Court of the United States will do to settle the federal questions involved renders it distinctively substantial.

CONCLUSION

The applicable law as enunciated by this Supreme Court in the cases set forth herein clearly demonstrates that barring Appellant's previously accrued cause of action by retroactively applying Pullum to Appellant's case violated Appellant's due process rights under the Fourteenth Amendment of the Constitution of the United States, and, accordingly, Appellant's petition should be granted.

Respectfully submitted,

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Post Office Box 2379
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904/243-8194

June 19, 1987

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 19th day of June, 1987, to G. Jack Hardy, Esquire, 501 Northeast First Avenue, Miami, Florida 33132; John N. Boggs, Esquire, Post Office Box 1937, Panama City, Florida 32402; J. Dixon Bridgers, III, Esquire, Post Office Box 13010, Pensacola, Florida 32598; Thomas C. Schult, Esquire, 2600 Mutual Life Benefits Building, 2345 Grand Avenue, Kansas City, Missouri 64108; Gerald M. McGill, Esquire, 202 West Jackson Street, Pensacola, Florida 32501; John L. Myrick, Esquire, 625 North 9th Avenue, Pensacola, Florida 32501; Cathy B. Lerman, Esquire, Post Office Box 030067, Fort Lauderdale, Florida 33303-0067; Edward T. O'Donnell, Esquire, 200 South Biscayne Boulevard, Suite 4500, Miami, Florida 33131-2378; William Bissett, Esquire, 501 Northeast First Avenue, Miami, Florida 33132; Sharon Lee Stedman, Esquire, 11 East Pine Street, Orlando, Florida 32802.

Thomas T. Remington

THOMAS T. REMINGTON

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, et al, APPELLANTS

v.

THE FIRESTONE TIRE & RUBBER CO., etc., et al, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL STATEMENT

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SUPREME COURT OF FLORIDA

Friday, March 27, 1987

Case No. 69,668

District Court of Appeal
First District No. BK-198

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY as wife of KENNETH CASSIDY,

Petitioners,

v.

FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Respondents.
_____/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under

Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, C.J., EHRLICH, SHAW and BARKETT, J.J., concur

OVERTON, J., dissents.

DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

September 23, 1986
Rehearing denied October 23, 1986

Appellants seek review of a summary final judgment entered in a products liability action for a 1982 injury, asserting that the court erred by applying section 95.031(2) Florida Statutes. We affirm the order appealed.

Section 95.031(2), Florida Statutes (1982),[1] provided that:

> Actions for products liability... must be begun...within 12 years after the date of delivery of the completed product to its original purchaser....

Appellants' action involves an injury which

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1 The statute has since been amended. See Chapter 86-272, Laws of Florida (1986).

occurred more than twelve years after the allegedly defective product was delivered to the original purchaser, and the action was thus not begun within the period prescribed by section 95.031(2). Both the injury and the commencement of the action occurred subsequent to the Florida Supreme Court's decision in Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1981), that in those circumstances "section 95.031(2) denies access to courts under article I, section 21, Florida Constitution." However, after appellants' action was filed, the supreme court receded from Battilla and upheld the constitutionality of section 95.031(2) in Pullum v. Cincinnati, Inc., 476 So.2d 675 (Fla. 1985). As in the present case, in Pullum summary judgment was granted to bar a products liability action by application of section 95.031(2).

Appellants contend that Pullum should not be given effect in the present case, since appellants' action was filed after the decision in Battilla but prior to the decision in Pullum. However, appellants have shown no

substantial inequity or unfairness which would result upon application of the Pullum ruling, nor does the decision in Pullum suggest that it should be limited to prospective application.[2] As indicated in Florida Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1944), decision overruling earlier precedent are generally given retroactive effect whereby judicial construction of a statute is deemed to relate back to the statute. Appellants have shown no cause to depart from this general rule

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2 Appellants' only suggestion of reliance on Battilla is the financial cost of initiating litigation. This assertion does not encompass a detrimental change in legal position, and such financial reliance does not preclude application of the Pullum decision in the present case. We note also that in denying rehearing the supreme court in Pullum rejected a contention that the decision should not apply to a pending action.

in the present case.[3] We therefore determine that Pullum should be given effect and appellants' action is barred by section 95.031(2), Florida Statutes (1982).

The order appealed is affirmed.

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3 Several cases in federal district court have addressed this issue with varying results. E.g. compare Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45 (N.D. Fla. 1986), and Lamb v. Volkswagewerk Aktiengesellschaft, 631 F.Supp. 1144 (S.D. Fla. 1986), with George v. Firestone Tire and Rubber Co., Case No. GCA-85-0117-MMP (US SCN Fla., June 13, 1986), and Owens v. Firestone Tire and Rubber Co., Case No. 84-350-Civ-T-10 (U.S.D.C.M. Fla., Jan. 28, 1986)[Available on WESTLAW, DCTU Database

IN THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

EFFIE DELL CASSIDY,
et al,

Plaintiffs,

v. Case No. 83-1934

THE FIRESTONE TIRE &
RUBBER CO., etc. et al,

Defendants.

ORDER

The above cause is before the Court on defendants' motions for summary judgment based on Pullum v. Cincinnati, Inc., etal, 10 FLW 429 (Fla. August 29, 1985). Upon consideration of arguments and briefs of counsel, the Court has concluded Pullum has retroactive application, and defendants are entitled to judgment as a matter of law. It is therefore,

ORDERED AND ADJUDGED that the motions of Defendants The Firestone Tire and Rubber Company, The Ford Motor Company and The

Budd Company for summary judgment are hereby granted.

DONE AND ORDERED at Pensacola, Escambia County, Florida, this 27th day of November, 1985.

M. C. Blanchard
CIRCUIT JUDGE

Copy hereof furnished to:
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John L. Myrick, Esq., 438 East Government Street, Pensacola, FL 32501
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J. Dixon Bridgers, III, Esq., P. O. Box 12426, Pensacola, FL 32582.

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v. No. 69,668

FIRESTONE TIRE AND RUBBER COMAPNY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Effie Dell Cassidy, as guardian of the person of Kenneth Cassidy, Florida National Bank, as guardian of the property of Kenneth Cassidy, and Sharon Cassidy, as wife of Kenneth

Cassidy, the appellant above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida entered in this action on March 27, 1987, by denial of review.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 12th day of June, 1987, to G. Jack Hardy, Esq., 501 NorthEast First Avenue, Miami, Florida 33132, John N. Boggs, Esq., Post Office Box 1937, Panama City, Florida 32402, J. Dixon Bridgers, III, Esq., Post Office Box 13010, Pensacola, Florida 32598, Thomas C. Schult, Esq., 2600 Mutual Life Benefits Building, 2345 Grand Avenue, Kansas City, Missouri 64108, Gerald M. McGill, Esq., 202 West Jackson Street, Pensacola, Florida 32501, John L. Myrick, Esq., 625 North 9th Avenue, Pensacola, Florida 32501, Cathy B. Lerman, Esq., Post Office Box 030067, Fort Lauderdale, Florida 33303-0067, Edward T. O'Donnell, Esq., 200 South Biscayne

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THOMAS L. GEORGE and
TOMMIE GEORGE, his wife,

Plaintiffs,

v. Case No.
GCA 85-0117-MMP

FIRESTONE TIRE &
RUBBER CO., etc. etal,

Defendants.

ORDER

This cause comes before the Court upon numerous inter-related pretrial motions. First, the plaintiffs move to dismiss/strike (doc 43) the fourth and fifth affirmative defenses asserted in defendant Firestone's answer to plaintiff's amended complaint (doc 42). The fourth affirmative defense is that "plaintiffs' amended complaint is barred by Section 95.031(2) of the Florida Statutes in that the subject multi-piece truck wheel was delivered to the original

purchaser more than twelve (12) years before the filing of this action." The fifth affirmative defense is simply that "plaintiff's claims are barred by the applicable statutes of limitation." Also pending before the Court are defendants' motions (doc 44 and 47) for summary judgment based on the bar of the statute of repose, Fla. Stat. §95.031(2). Finally, defendant Budd has filed a motion for leave to amend its answer to include the statute of limitations defense (doc 51).

Defendant Firestone has asserted an affirmative defense based on "the applicable statute of limitations". The proposed amended answer is identical in this respect. No specific limitations period or provision is recited. Plaintiffs' complaint was filed April 10, 1985. The complaint states that plaintiff was injured on March 2, 1982 when the multi-piece wheel rim manufactured by defendants exploded. Fla. Stat. §92.11 provides that such as this must be commenced within four years. Plaintiffs have indis-

putably filed within the time allowed under Florida's statute of limitations. There being no dispute over these essential facts, plaintiffs' motion to dismiss/strike Firestone's fourth affirmative defense is GRANTED.

There remains the more difficult question of the applicability of the statute of repose. A statute of repose differs significantly from a statute of limitation. As the Court stated in Lamb v Volkswagenwerk Aktiengesell Schaft, 631 F. Supp. 1144, 1147 (S.D. Fla., 1986), "[W]hile in the most general sense statutes of repose and statutes of time limitation are similar in that they prescribe the periods within which actions may be brought we think there are critical analytical distinctions between the two and we do not use the terms interchangeably here".

A statute of limitation serves the salutory purposes of promoting diligence and preventing the prosecution of stale claims. Nardone v Reynolds, 333 So.2d 25, 36 (Fla. 1976) ("The purposes of the stat-

utes of limitations are to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution.") Within a certain amount of time after one's cause of action accrues, one must institute proceedings or be barred by the statute of limitations.

In an action founded on negligence, one's cause of action accrues at the moment in time when one is injured as a result of the negligence. (An exception based on belated discovery of an injury is not pertinent here.) "Where a claim for redress is based upon negligent injury to person or property, the cause of action accrues when there has been a negligent act with proximately resulting injury or damage. The careless act itself is not enough to give rise to a cause of action; there must also be consequential injury or damage." Rosenberg v Town of North Bergen, 293 A.2d 662,666 (N.J. 1972); cf. Coombs v Getz,

285 U.S. 434, 442 (1932) (cause of action under term of contract incorporating statutory provision arose upon the creation of contractual liability, not upon the passage of the Rule of Law); Shearn v Orlando Funeral Home, 88 So.2d 591, 593 (Fla. 1956) ("[A] cause of action is the right which a party has to institute a judicial proceeding."); Luckie v McCall Mfg. Co., 153 So.2d 31 (Fla. 1st DCA 1963) (cause of action accrues at the time and place when injury occurs and damage results.)

Unlike a statute of limitations, which does not begin to run until one's cause of action accrues, the time period of a statute of repose runs without reference to when one's cause of action accrued. The statute of repose begins running when the product is delivered or the work is completed. Thus, if one is injured on a date after expiration of the period of time established in the statute of repose, one's cause of action never accrues. As explained by the Florida Supreme Court, "[R]ather than establishing a time limit within which action must be brought, measured from the time of

accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." Bauld v. J.A. Jones Constr. Co., 357 So.2d 401, 402 (Fla. 1978); but see, Berry v Cessna Aircraft Corp., 717 P.2d 678 (Utah 1985) (rejecting analysis that statute of repose prevents a cause of action from accruing when one is not injured until after the time has run).

It is not disputed in this case that if the statute of repose had been fully effective at the time of plaintiff's injury, plaintiff would have been without redress. The statute of repose would have run before plaintiff was injured and would have cut off plaintiff's right of action before his cause of action accrued. But in Battilla v Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) (products liability action) and in Overland Construction Co. v Sirmons, 369 So.2d 572 (Fla 1979) (action based on

design, planning or construction of improvements to real property) the Florida Supreme Court held that it worked an unconstitutional denial of access to courts when the statute of repose acted as an absolute bar to a cause of action of one not injured until after expiration of the period of repose. After those cases, the statute of repose remained on the books with limited force and effect. The statute of repose was null and void insofar as the causes of action of persons injured after the period expired. As for those injured less than the prescribed period of time after delivery of the product or completion of the work, the statute of repose operated as sort of hybrid statute of limitation. One injured by a product less than twelve years from delivery of that product had the lesser of four years from when the cause of action accrued or twelve years from the date of delivery of the product in which to file suit. Yet a third time computation was required if the amount of time one had in which to file was not a "reasonable" amount of time after the cause of action accrued, as for example, when one

is injured three days before the expiration of the twelve year period. See Universal Engineering Corp. v Perez, 451 So.2d 463 (Fla. 1984); MacRae v Cessna Aircraft Co., 457 So.2d 1093, 1094 (Fla. 1st DCA 1984).

Years passed; years in which the statute of repose had only limited force and effect; years in which plaintiff was injured and filed his complaint. Then, in Pullum v Cincinnati, Inc., 476 So.2d 657 (Fla 1985) the Florida Supreme Court suddenly receded from Battilla and held that the statute of repose did not unconstitutionally prevent access to courts by persons injured more than twelve years after delivery of a product. The question now before this Court is whether Pullum is to be applied retroactively to bar plaintiffs' cause of action.

Jurisdiction of this case is predicated on diversity, therefore under Erie Railroad Co. v Tompkins, 304 U.S. 64 (1938) this Court is bound to follow Florida law in determining whether or not Pullum has retroactive application. Thorsby v

Williams-White & Co., case no. TCA 84-7230-WS (N.D. Fla. Jan. 30, 1986). In the seminal case, Florida Forest and Park Service v Strickland, 154 Fla. 472 (18 So.2d 251 (1944), the Florida Supreme Court explained the law governing retroactive application of a judicial decision overturning a former decision. Generally, the later decision will be applied both prospectively and retrospectively, unless one of two possible exceptions applies. The first exception is when the decision is expressly declared to have only prospective effect. The second exception is "that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation". Strickland, 154 Fla. at ___, 18 So.2d at 253.

Plaintiff has indeed acquired a property right which would be destroyed by retrospective operation of Pullum. During

the dormancy of the statute of repose, between Battilla and Pullum, plaintiff's cause of action accrued. An accrued cause of action must be carefully distinguished from the sort of generalized right to sue possessed by one who had not yet been injured, one merely has a non-vetsed right to sue which can be legislatively withdrawn. See, e.g., Ducharme v Merrill-National Laboratories, 574 F.2d 1307 (5th Cir. 1978) (cause of action against manufacturer did not arise until after passage of Swine Flu Act; in the absence of a prior vested right in a cause of action, due process not violated by statutory abrogation of the tort claim); cf. State v White, 194 So.2d 601 (Fla. 1967) appellant had no vested right in statute which provided exemption under which he operated his business; legislature could and did repeal that exemption. However, where a court had held the repealing legislation unconstitutional and plaintiff carried on his operations pursuant to that decision, the current decision holding the repealing legislation

constitutional would not be applied retroactively against appellant). An accrued cause of action, on the other hand, is a species of property protected by the due process clause, of which plaintiff may not be deprived by retroactive application of Pullum. See Logan v Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's due process clause."); Coombs v Getz, 285 U.S. 434, 442 (1932) ("[N]either vested property rights nor the obligation of contracts of third persons may be destroyed or impaired... The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right...) to enforce his cause of action upon the contract."); Brinkerhoff-Faris Trust & Savings Co. v Hill, 281 U.S. 673 (1930) (state Supreme Court held statute unconstitutional, plaintiff proceeded under that rule of law. Later decision of state Supreme Court reversing and holding

statute constitutional could not be retroactively applied to bar plaintiff's cause of action because plaintiff would thereby be deprived of property without due process. "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid. . . state statute. . ") (citations omitted); Ettor v Tacoma, 228 U.S. 148, 155-56 (1913) ("The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. . .The right of the plaintiffs in error was fixed by the law in force. When their property was damaged for public purposes and the right so vested cannot be defeated by subsequent legislation.") (emphasis added); Pritchard v Norton 106 U.S. 124

132 (1882) ("Hence it is that a vested right of action is property in the same sense in which tangible things are property and it is equally protected against arbitrary interference."); Hartford Fire Insurance Co. v Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367 (6th Cir. 1984) (distinguishing between "cause of action" generally speaking and "accrued causes of action", holding the former may be abolished by legislative action, as when a statute of repose prevents a cause of action from accruing by running before one is injured); Keller v Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971) ("While conceding that one can have no vested interest in any rule of common law, these cases emphasized that a right created under such a rule which has been perfected could not be taken away without being violative of the Fifth and Fourteeneth Amendments"); Mitchell v Doggett, 1 Fla. 356, 371-72 (1847) (distinguishing between rights which may legislatively be altered and vested rights which cannot be affected by retroactive application of a change in the law, Florida

Supreme Court held that the law in effect at the time the parties entered into their contract conveyed rights on them which then vested and could not be changed by repeal of the law); Berry v Beech Aircraft Corp., 717 P.2d 678 (Utah 1978) (discussing constitutionality of statute of repose, Utah Supreme Court noted that an accrued cause of action is a vested property right of which one cannot be deprived without due process).

Division of Workers Comp. v Brevda, 420 So.2d 887 (Fla. 1st DCA 1982), cited in Lamb, is not contrary to the authorities cited above. In Brevda the Court held that a statute entitling prevailing parties to an award of attorney's fees was a non-vested right until such time as one became a prevailing party by entry of judgment. The holding that no right to fees vested until one prevailed has nothing whatsoever to do with the question whether an injured party has a vested right to sue as of the time the cause of action accrued.

Based on all the foregoing, this Court concludes that plaintiff's cause of action validly accrued and became vested when plaintiff was injured. That accrued cause of action is a property right. The law of Florida, as expressed in Strickland, is that it is not proper to apply a judicial decision retroactively if doing so would deprive plaintiff of a property right. Furthermore, retroactive application of Pullum to bar plaintiff's previously accrued cause of action would plainly violate plaintiff's federal due process rights. Thus, under both Florida and Federal law, this Court can not, should not and will not apply Pullum retroactively to extinguish plaintiff's accured cause of action.

Accordingly,

1. Plaintiffs' motion to dismiss/strike defendant Firestone's fourth and fifth affirmative defenses is GRANTED.

2. Defendant Budd's motion to amend answer to add affirmative defenses virtually identical to Firestone's fourth and fifth affirmative defenses is DENIED AS MOOT.

3. Defendant's motions for summary judgment based on the statute of repose are DENIED.

DONE AND ORDERED this 13th day of June, 1986.

Maurice M. Paul
United States District Judge